

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

G. DALLAS HOTRON & ASSOCIATES,

Plaintiff(s),

v.

CYNTHIA HARRIS, et al.,

Defendant(s).

Case No. 2:15-CV-1693 JCM (GWF)

ORDER

Interpleader plaintiff G. Dallas Horton and Associates (“interpleader plaintiff”) filed a motion to distribute funds pursuant to Federal Rule of Civil Procedure 22. (ECF No. 36). The motion listed nineteen defendants. (*Id.*). Four defendants filed responses: Southwest Airlines Co. (“Southwest”) (ECF No. 37), Align Chiropractic (“Align”) (ECF No. 38), Medical Funding Resources (“MFR”) (ECF No. 39), and Anthem Chiropractic (“Anthem”) (ECF No. 40). Plaintiff filed replies to each defendant. (ECF Nos. 41–44).

Due to their failure to respond to the interpleader plaintiff’s motion, plaintiff also moves to dismiss defendants Select Physical Therapy, Las Vegas Radiology, American Medical Response, Radiology Associates, and St. Rose Dominican – San Martin Campus from the interpleader. (ECF No. 53).

As an initial matter, defendants who did not respond to the interpleader motion consented to dismissal by default. *See* D. Nev. R. 7-2(d) (“The failure of the opposing party to file points and authorities in response to any motion shall constitute a consent to granting the same.”) Thus, Select Physical Therapy, Las Vegas Radiology, American Medical Response, Radiology Associates, and St. Rose Dominican – San Martin Campus are dismissed.

1 The remainder of this order discusses the allocation of funds amongst the remaining
2 defendants pursuant to FRCP 22.

3 **I. Background**

4 This is a dispute over competing interests in a liability benefits settlement fund. Cynthia
5 Harris was involved in an automobile accident. (ECF No. 36). The collision resulted in series of
6 injuries requiring health benefits be provided by her personal insurer, Southwest Airlines. (*Id.*).
7 She also accumulated extensive medical bills from parties including Align Chiropractic, Anthem
8 Chiropractic, and Medical Funding Resources (“MFR”). (*Id.*).

9 Thereafter, Harris obtained interpleader plaintiff G. Dallas Horton and Associates
10 (“plaintiff”) as counsel, on contingency basis. With assistance of counsel, Harris obtained a
11 \$35,000 settlement. Of the \$35,000, \$15,000 was paid out of a self-funded employee welfare plan
12 from Southwest Airlines through National General. (ECF No. 1 at 2). The remaining \$20,000 was
13 paid out of the other party’s collision insurance from GEICO. (*Id.*)

14 This matter is before the court because Harris allegedly refused to permit the interpleader
15 plaintiff to pay Lincoln Financial any portion of its interest on the settlement. (ECF No. 36).
16 However, since that time, Lincoln Financial has relinquished its interest in the settlement. (ECF
17 No. 52-7). Absent knowledge of Lincoln Financial’s relinquishment of its interest, interpleader
18 plaintiff moved for \$13,285.91 in attorney’s fees. (ECF No. 36).

19 **II. Legal Standard**

20 FRCP 22 states that “persons with claims that may expose a plaintiff to double or multiple
21 liability may be joined as defendants and required to interplead.” FED. R. CIV. P. 22. “The
22 availability of attorney’s fees for interpleader plaintiffs recognizes that by bringing the action, the
23 plaintiff benefits all parties by promoting early litigation on the ownership of the fund, thus
24 preventing dissipation.” *Trustees of the Directors Guild of Am. v. Tise*, 234 F.3d 415, 426 (9th
25 Cir. 2000). “Courts generally have discretion to award attorney’s fees to a disinterested
26 stakeholder in an interpleader action.” *Wells Fargo Bank, Nat. Ass’n v. PACCAR Fin. Corp.*, No.
27 1:08-CV-00904-AWI-SMS, 2009 WL 211386, at *2 (E.D. Cal. 2009); *see also Abex Corp. v. Ski’s*
28 *Enters., Inc.*, 748 F.2d 513, 516 (9th Cir. 1984).

1 “The burden of establishing entitlement to an attorneys’ fees award lies solely with the
 2 claimant.” *Tise*, 234 F.3d at 427; *see also Hensley v. Eckerhart*, 461 U.S. 424, 437 (U.S. 1983).
 3 The Ninth Circuit has explained that fee awards in interpleader actions are “typically modest”
 4 because “there is an important policy interest in seeing that the fee award does not deplete the fund
 5 at the expense of the party who is ultimately deemed entitled to it.” *Tise*, 234 F.3d at 426–27;
 6 *Allianz Life Ins. v. Agorio, No.*, C 11-04404 LB, 2012 WL 440722, at *5 (N.D.Cal. Feb.10, 2012).

7 **III. Discussion**

8 Interpleader plaintiff argues it is entitled to a priority lien over defendants and thus should
 9 be awarded attorney’s fees pursuant to his agreement with Harris. (ECF No. 36). It states that the
 10 correct fee owed is 33 and 1/3 percent of the \$20,000 GEICO settlement, 40 percent of the National
 11 General \$15,000 settlement, and \$619.25 in costs, totaling \$13,285.91.

12 Defendant Southwest Airlines argues that the plan’s reimbursement provision provides that
 13 the plan has a first priority lien over plaintiff’s attorney’s fees. (*Id.*). Given that the Employee
 14 Retirement Income Security Act (“ERISA”) governs Southwest’s plan, defendant Southwest
 15 argues the plan supersedes attorney’s fees. (ECF No. 37). Plaintiff concedes Southwest has a first
 16 priority lien, but argues it is entitled to attorney’s fees before defendants Align, MFR, and Anthem.
 17 (ECF No. 41). Accordingly, consistent with ERISA, Southwest’s repayment plan is entitled to full-
 18 reimbursement from settlement proceeds. (ECF No. 41). Therefore, Southwest Airlines will
 19 receive \$9,124.56 of the settlement from Harris’ car accident.

20 The court now turns to distributing the remaining fees. In total, there is \$25,875.44
 21 remaining. There are three questions that need to be answered: (1) what is the appropriate
 22 contingency fee percentage owed to plaintiff; (2) who has priority in fee recovery from the
 23 remaining settlement; and (3) how should the remaining funds, if any, be split.

24 Defendants Align, MFR, and Anthem argue that plaintiff is only entitled 33 and 1/3 percent
 25 of Harris’s settlement, which entitles plaintiff to \$12,285.91, not \$13,285.91. (ECF Nos. 38, 39).
 26 Defendants Align, MFR, and Anthem also request the remaining settlement fund be distributed
 27 pro-rata to defendants. (*Id.*). Such a distribution, they argue, would entitle defendant Align to
 28 \$7,421.60 and MFR to \$1,650.00. (*Id.*).

1 Plaintiff responds it is entitled to 40 percent of fees from the National General settlement
 2 because the present action is either litigation or arbitration, which entitles it to 40 percent under its
 3 fee agreement (ECF No. 42). Plaintiff does not provide argument on further distribution of funds.
 4 (ECF No. 41).

5 (1) *Appropriate contingency*

6 According to the attorney retainer agreement between Harris and plaintiff, the attorney
 7 shall be paid “thirty three and one-third percent (33 1/3%) of any money recovered before a
 8 lawsuit, demand for arbitration, demand of mediation, or notice of appearance for an
 9 administrative hearing is filed or received, and forty percent (40%) of any money received after
 10 such event.” (ECF No. 36-1).

11 In order to recover 40 percent of the remaining money, plaintiff must show the money is
 12 received after a lawsuit, demand for arbitration or mediation, or notice of appearance for
 13 administrative hearings is filed. (*Id.*). There is no indication of arbitration, mediation, or
 14 involvement of an administrative hearing. The only relevant issue is whether the money at issue
 15 in this interpleader action constitutes “money recovered before [or after] a lawsuit. . . . [was]
 16 filed.” (ECF No. 36-1).

17 The court first turns to the wording of the contract. “Contract terms are to be given their
 18 ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be
 19 ascertained from the contract itself. Whenever possible, the plain language of the contract should
 20 be considered first.” *Flores v Am. Seafoods Co.*, 335 F.3d 904, 910 (9th Cir. 2003).

21 The contract indicates the attorney is entitled one-third of any money recovered before a
 22 lawsuit, demand for arbitration, demand of mediation, or notice of appearance. (ECF No. 36-1).
 23 The interpleader plaintiff itself indicates that Harris was tendered \$15,000 from GEICO and
 24 \$20,000 from National General on February 17 and 18, 2015, respectively. (ECF No. 36 at 3). This
 25 current lawsuit was initiated July 24, 2015; therefore, the money was recovered before the current
 26 lawsuit was initiated. Under a plain-face reading, the interpleader plaintiff is entitled only to one-
 27 third of the settlement, which is \$11,666.66 plus \$619.25 in attorney costs, totaling \$12,285.91.
 28 The question remains who has priority of the available settlement.

1 (2) *Priority interests*

2 Attorney liens enjoy priority over those from medical providers. *See Michel v. Eighth*
 3 *Judicial Dist. Court ex Rel. County of Clark*, 117 Nev. 145, 153 (2001). An attorney lien, however,
 4 is only enforceable when it is attached and perfected pursuant to statute. *See Leventhal v. Black &*
 5 *LoBello*, 129 Nev., Adv. Op. 50, 305 P.3d 907, 911 (2013). According to N.R.S. § 18.015(3), an
 6 attorney perfects its lien “by serving notice in writing, in person or by certified mail, return receipt
 7 requested, upon his or her client and, if applicable, upon the party against whom the client has a
 8 cause of action, claiming the lien and stating the amount of the lien.” NEV. REV. STAT. § 18.015(3).

9 “Attorney's liens in Nevada are creatures of statute. As such, the notice requirements of the
 10 statute must be met before the lien may be deemed properly perfected. To find otherwise, would
 11 effectively eliminate the specifically enumerated avenues of notice that are set forth in the statute.”
 12 *Schlang v. Key Airlines, Inc.*, 158 F.R.D. 666, 696 (1994). “NRS 18.015(4) requires that such
 13 notice be served before any funds are received.” *Golightly & Vannah, PLLC v. TJ Allen, LLC*,
 14 2016 WL 3090932 *3 (Nev. 2016). For attorneys working on a contingency basis, the notice of
 15 the lien must disclose an attorney’s agreed-upon contingency percentage and claimed court costs
 16 advanced by the attorney. *Id.*

17 Here, the statutory lien has been perfected based on interactions between plaintiff and
 18 defendant. The signed contingency agreement specifies the agreed-upon contingency fee and
 19 describes the current lawsuit. (ECF No. 36-1). As such, the lien has been perfected. Being that the
 20 interpleader plaintiff has priority, it is entitled to \$12,285.91 before the other interpleaded parties.
 21 The last question is how to distribute the remaining \$13,589.66,

22 (3) *Distribution of remaining funds*

23 Defendants’ claim the following interests: Align claims an interest of \$7,424.10; MFR
 24 claims an interest of \$1,650; and Anthem claims an interest of \$2,045.85. (ECF Nos. 38, 39). Given
 25 that there is \$13,589.66 remaining, and the combined remaining interests total \$11,120.55, all
 26 remaining interests are ordered to be paid out of the remaining settlement. For clarification, pro-
 27 rata distribution is not necessary because the settlement contains sufficient funds to fulfill each
 28 party’s interest.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that interpleader plaintiff G. Dallas Horton & Associates motion to distribute funds pursuant to FRCP 22 (ECF No 36) be, and the same hereby is, GRANTED, consistent with the foregoing.

IT IS FURTHER ORDERED that the interpleader plaintiff G. Dallas Horton & Associates is entitled \$12,285.91, defendant Southwest Airlines is entitled \$9,124.56, defendant Align Chiropractic is entitled \$7,424.10, defendant Medical Funding Resources is entitled \$1,650, and defendant Anthem Chiropractic is entitled \$2,045.85. Interpleader plaintiff G. Dallas Horton & Associates shall distribute funds accordingly.

IT IS FURTHER ORDERED that the interpleader plaintiff G. Dallas Horton & Associates' motion to dismiss defendants Select Physical Therapy, Las Vegas Radiology, American Medical Response, Radiology Associates, and St. Rose Dominican – San Martin Campus (ECF No. 53) be and the same hereby GRANTED.

DATED July 28, 2016.


UNITED STATES DISTRICT JUDGE